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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

AIDAN MONAGHAN,

Plaintiff,

vs.

FEDERAL BUREAU OF
INVESTIGATION,

Defendant.

Case No. 2:07-cv-01614-RCJ-(GWF)

**COMBINED MOTION FOR SUMMARY JUDGMENT AND
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Defendant Federal Bureau of Investigation ("FBI"), by and through its attorneys, hereby opposes Plaintiff's Motion for Summary Judgment (#41) and respectfully moves this Court to grant summary judgment in favor of Defendant. Defendant relies on the following memorandum of points and authorities, as well as all papers and pleadings on file, in support of its motion and

1 opposition.

2 Dated: October 16, 2008

3 Respectfully submitted,

4 GREGORY A. BROWER
United States Attorney

5 PATRICK A. ROSE
6 Assistant United States Attorney

7 JOHN R. TYLER
8 Senior Trial Counsel

9 /s/ Stephen J. Buckingham
STEPHEN J. BUCKINGHAM
10 Trial Attorney

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 This is an action filed under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, by
4 *pro se* plaintiff, Aidan Monaghan, against the Federal Bureau of Investigation (“FBI”). In his
5 Amended Complaint, Plaintiff seeks documents revealing the process used by the FBI to identify the
6 aircraft used during the terrorist attacks of September 11, 2001. However, because this request for
7 records is markedly different from Plaintiff’s original FOIA request, received by the FBI on
8 September 12, 2007, Plaintiff’s Amended Complaint should be dismissed under Federal Rule of
9 Civil Procedure 12(b)(1) for failure to exhaust administrative remedies.

10 In addition to Plaintiff’s failure to exhaust his administrative remedies, his Amended
11 Complaint should also be dismissed because the FBI has fully complied with its responsibilities
12 under FOIA. Even though it was not obligated to do so, the FBI conducted a search for the
13 documents requested in the Amended Complaint. As the identity of the aircrafts used in the
14 September 11th attacks has never been in question, the FBI’s search recovered no responsive
15 documents. The previously submitted declaration of David M. Hardy (“Hardy Decl.”) (#34), Section
16 Chief of the Record/Information Dissemination Section of the FBI’s Records Management Division,
17 makes clear that the FBI’s search was reasonably calculated to uncover relevant documents. The
18 FBI, therefore, has complied with its responsibilities under FOIA and is entitled to summary
19 judgment on Plaintiff’s claim.

20 **STATEMENT OF MATERIAL FACTS**

21 By an undated letter to the FBI’s Record/Information Dissemination Section (“RIDS”),
22 received on September 12, 2007, Plaintiff submitted a request under FOIA for “documentation
23 pertaining to any formally and positively identified debris by the FBI, from all 4 civilian commercial
24 aircraft used in the terrorist attacks of September 11, 2001[.]” Letter from Aidan Monaghan to FBI
25 (undated) (Amended Complaint (“Am. Compl.”), Ex. 1). By letter dated September 24, 2007, FBI
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headquarters (“FBIHQ”) acknowledged Plaintiff’s request and advised Plaintiff that any responsive information would be exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(A). Letter from David M. Hardy to Aidan Monaghan (Sept. 24, 2007) (Am. Compl., Ex. 2). FBIHQ also advised Plaintiff of his right to appeal the denial of his request to OIP. Id.¹

By an undated letter received on October 25, 2007, Plaintiff appealed the denial of his FOIA request to OIP. Letter from Aidan Monaghan to OIP (undated) (Am. Compl., Ex. 3). OIP affirmed the FBI’s denial of Plaintiff’s FOIA request. Letter from Janice Galli McLeod, Associate Director OIP, to Aidan Monaghan (Nov. 26, 2007) (Am. Compl., Ex. 4).

On January 23, 2008, Plaintiff filed this action seeking access to:

agency records, concerning documentation revealing the process by which wreckage recovered by defendant, from the aircraft used during the terrorist attacks of September 11, 2001, was positively identified by defendant (with the aid of the National Transportation Safety Board), as belonging to the said aircraft, presumably through the use of unique serial number identifying information contained by the said aircraft’s wreckage, that was collected by defendant and which defendant has improperly withheld from plaintiff. The data sought by plaintiff is the basis for the F.B.I.’s current public position, that the following 4 flights were those that were involved in the terrorist attacks of September 11, 2001: American Airlines flight 11, United Airlines flight 175, American Airlines flight 77 and United Airlines flight 93.

Am. Compl. ¶ 1. Because the request contained in the Amended Complaint differed substantially from Plaintiff’s original FOIA request, the FBI conducted an additional search for potentially responsive documents. Hardy Decl. ¶ 14. By letter dated March 12, 2008, the FBI advised Plaintiff that, following a records search and extensive research into Plaintiff’s request, no responsive records were located. Letter from David M. Hardy to Aidan Monaghan (March 12, 2008) (Hardy Decl., Ex.

¹ Plaintiff submitted duplicate FOIA requests to FBIHQ by letter dated September 6, 2007, (Hardy Decl., Ex. C), and by electronic mail dated October 1, 2007, (Hardy Decl., Ex. D). By letter dated October 30, 2007, FBIHQ responded to these requests, again informing Plaintiff that any responsive records would be exempt from disclosure. (Hardy Decl., Ex. E). The postal service returned this letter on November 9, 2007, as undeliverable. Hardy Decl. ¶ 9 n.3. Plaintiff submitted a fourth duplicate request for information by letter dated March 19, 2008, to FBIHQ. (Hardy Decl., Ex. J).

1 D).

2 On October 3, 2008, Plaintiff filed a Motion for Summary Judgment on his FOIA claim.
3 Pl.'s Mot. for Sum J. (#41).

4 ARGUMENT

5 **I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIM BECAUSE** 6 **PLAINTIFF HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES**

7 Under FOIA, administrative remedies must be exhausted before an individual may seek
8 relief in district court. See 5 U.S.C. § 552(a); U.S. v. U.S. Dist. Court, 717 F.2d 478, 480 (9th
9 Cir. 1983). Dismissal of a FOIA request is appropriate under Rule 12(b)(1) of the Federal Rules
10 of Civil Procedure where a FOIA complainant fails to exhaust administrative remedies. In re
11 Steele, 799 F.2d 461, 465 (9th Cir. 1986) (holding that plaintiffs' "failure to exhaust their
12 administrative remedies deprived the district court of the authority to issue an order compelling
13 disclosure of the requested information" and instructing the district court "to dismiss for lack of
14 jurisdiction").

15 Here, Plaintiff's Amended Complaint contains a request for information which differs
16 significantly from the information sought in Plaintiff's initial FOIA request. Plaintiff initially
17 requested "documentation pertaining to any formally and positively identified debris by the FBI,
18 from all 4 civilian commercial aircraft used in the terrorist attacks of September 11, 2001[.]"
19 Letter from Aidan Monaghan to FBI (undated) (Am. Compl., Ex. 1). Plaintiff now seeks
20 "agency records, concerning documentation revealing the process by which wreckage recovered
21 by defendant . . . was positively identified by defendant . . . as belonging to the said aircraft,
22 presumably through the use of unique serial number identifying information contained by the
23 said aircraft's wreckage[.]" Am. Compl. ¶ 1.

24 Plaintiff has not exhausted his administrative remedies with respect to the request for
25 information contained in the Amended Complaint as is required under FOIA. In re Steele, 799
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1 F.2d at 465. FOIA specifies that a request for information must be made in accordance with the
 2 agency's published regulations. 5 U.S.C. § 552(a)(3)(A)(ii). A request for documents in a
 3 complaint does not constitute a proper FOIA request. See 28 C.F.R. § 16.3 (providing
 4 requirements for making a FOIA request for records of the Department of Justice). As Plaintiff
 5 has failed to exhaust the administrative process with respect to the request for new information
 6 contained in the Amended Complaint, this Court should dismiss Plaintiff's Amended Complaint
 7 under Rule 12(b)(1). In re Steele, 799 F.2d at 465.²

8 **II. NO DOCUMENTS RESPONSIVE TO PLAINTIFF'S REQUEST EXIST AND**
 9 **PLAINTIFF'S CLAIM SHOULD BE DENIED AS MOOT**

10 Jurisdiction exists under FOIA only where an agency has (1) improperly (2) withheld (3)
 11 agency records. 5 U.S.C. § 552(a)(4)(B); Kissinger v. Reporters Comm. for Freedom of the
 12 Press, 445 U.S. 136, 150 (1980). A FOIA request becomes moot once it is answered or no
 13 responsive records are located following a reasonable search. Carter v. Veterans Admin., 780
 14 F.2d 1479, 1481 (9th Cir. 1986) (affirming summary judgment because agency's compliance
 15 with plaintiff's FOIA request mooted action). The FBI conducted a reasonable search for the
 16 records requested in Plaintiff's Amended Complaint and located no responsive records. Thus,
 17 Plaintiff's claim should be denied as moot.

18 1. In response to a FOIA request, an agency must conduct "a search reasonably
 19 calculated to uncover all relevant documents." Citizens Commission on Human Rights v.
 20 Federal Drug Administration, 45 F.3d 1325, 1328 (9th Cir. 1995) (quoting Zemansky v. EPA,

21
 22 ² In addition to improperly requesting information without exhausting administrative remedies,
 23 Plaintiff has also failed to name an appropriate agency as a defendant. Only federal agencies are
 24 proper party defendants in FOIA litigation. 5 U.S.C. § 552(a)(4)(B) (granting district courts
 25 "jurisdiction to enjoin the agency from withholding agency records improperly withheld from
 26 complainant"); 5 U.S.C. § 552(f) (defining "agency"). The FBI is not an agency within this
 definition because it is a component of an executive department – the Department of Justice. See
Judicial Watch, Inc. v. F.B.I., 190 F. Supp. 2d 29, 31 n.1 (D.D.C. 2002).

1 767 F.2d 569, 571 (9th Cir. 1985). “[A]ffidavits describing agency search procedures are
2 sufficient for purposes of summary judgment . . . if they are relatively detailed in their description
3 of the files searched and the search procedures, and if they are nonconclusory and not impugned
4 by evidence of bad faith.” Id. (quoting Zemansky, 767 F.2d at 573). While evidence of the
5 search should be reasonably detailed, the standard is not “meticulous documentation [of] the
6 details of an epic search for the requested records.” Perry v. Block, 684 F.2d 121, 127 (D.C. Cir.
7 1982)).

8 In general, the sufficiency of a search is determined by the “appropriateness of the
9 methods” used to carry out the search, “not by the fruits of the search.” Iturralde v. Comptroller
10 of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003). Accordingly, the failure of an agency “to
11 turn up a particular document, or mere speculation that yet uncovered documents might exist,
12 does not undermine the determination that the agency conducted an adequate search for the
13 requested record.” Wilbur v. CIA, 315 F.3d 675, 678 (D.C. Cir. 2004). In the absence of
14 “countervailing evidence” or “substantial doubt,” agency affidavits or declarations describing a
15 reasonable and adequate search are sufficient to demonstrate an agency’s compliance with FOIA.
16 See Iturralde, 315 F.3d at 314 (citations omitted); see also Valencia-Lucena v. Coast Guard, 180
17 F.3d 321, 326 (D.C. Cir. 1999) (noting that, with a properly-detailed agency declaration,
18 summary judgment remains appropriate unless “a review of the record raises substantial doubt”
19 about the adequacy of the agency search for records) (citation omitted).

20 2. The Hardy declaration demonstrates that the FBI conducted a search reasonably
21 calculated to uncover documents responsive to the request for information contained in the
22 Amended Complaint. This search included a search of the FBI’s central records system (“CRS”).
23 Hardy Decl. ¶ 23. The CRS contains records of administrative, applicant, criminal, personnel,
24 and other files compiled for law enforcement purposes. Id. ¶ 16. The FBI routinely searches the
25 CRS for documents responsive to FOIA requests. Id. The mechanism used for searching the
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1 CRS is the automated case support system ("ACS"), which is an internal computerized
2 subsystem of the CRS containing searchable data from more than 105 million records. Id. ¶¶ 16-
3 17. In response to the request contained in Plaintiff's amended complaint, RIDS conducted a
4 search of the CRS using the following subjects: "Airline Debris," "Debris Identification,"
5 "Commercial Aircraft," "Aircraft Identification," "Aircraft Debris," "Aircraft Wreckage,"
6 "Aircraft," "Recovered Debris," "National Transportation and Safety Bureau," "National
7 Transportation Safety Board," "NTSB," "American Airlines," "American Airlines Flight,"
8 "American Airlines Flight Eleven," "American Airlines Flight Number 11," "American Airlines
9 Flight 77," "N334AA," "N612UA," "N644AA," "N591UA," "Flight 175," "Flight 11," "Flight
10 77," "Flight 93," "Identifying Aircraft Parts," "Factual Report Aviation," "Federal Aviation
11 Administration," "Pentbomb," "Ground Zero," "Freshkills Landfill," and "Fresh Kills Landfill."
12 Id. ¶ 23.

13 In addition to the search of the CRS, RIDS' search also included verification by the
14 responsible FBIHQ operational division that the identities of the four aircraft hijacked on
15 September 11, 2001, have never been in question by the FBI, the National Transportation Safety
16 Board ("NTSB"), or the Federal Aviation Administration. Id. ¶ 24. Despite these extensive and
17 detailed search efforts, RIDS located no FBI records responsive to Plaintiff's request. Id. The
18 lack of documentation revealing the process by which the FBI identified the hijacked aircraft is
19 unsurprising because the identity of those aircraft has never been in question and because other
20 evidence collected after September 11, 2001, has corroborated the identity of the hijacked
21 aircraft. Id.

22 3. Plaintiff has presented no countervailing evidence demonstrating that the FBI
23 failed to engage in a reasonable search. See Perry, 684 F.2d at 127 ("[I]n the absence of
24 countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable
25 detail the scope and method of the search conducted by the agency will suffice to demonstrate
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1 compliance with the obligations imposed by the FOIA.”). Rather, the exhibits attached to
2 Plaintiff’s Amended Complaint support the FBI’s conclusion that the identity of the hijacked
3 aircraft has never been in question. For example, the e-mail response sent from the NTSB to an
4 inquiry from Plaintiff confirms that “NTSB investigators *rarely encounter a scenario when the*
5 *identification of an accident aircraft is not apparent.*” Am. Compl., Ex. 7 (emphasis added).
6 Plaintiff’s Exhibit 10 purports to be “FAA documents identified as ‘Summary of Air Traffic
7 Hijack Events.’” Am. Compl. ¶ 14. That document chronicles the loss of communications
8 between air traffic control authorities and flights already positively identified as American
9 Airlines Flight 11 and United Airlines Flight 175. Am. Compl., Ex. 10. The public remarks of
10 NTSB employees upon which Plaintiff relies indicate only that the NTSB recovered certain
11 physical evidence from two of the aircraft, Am. Compl., Ex. 5, and assisted the FBI in its
12 investigation of the September 11th attacks. Am. Compl., Ex. 6. Neither of these statements
13 suggest that the identity of the hijacked aircraft was ever in question.

14 Similarly, the supplemental exhibits Plaintiff has submitted support the FBI’s conclusion
15 that no records exist responding to Plaintiff’s request. Included among these exhibits are letters
16 from the NTSB responding to a separate FOIA request from Plaintiff to the NTSB for the same
17 information Plaintiff now seeks from the FBI. Ex. E (#36). In its initial response to Plaintiff’s
18 request, the NTSB confirms that, like the FBI, “the NTSB doesn’t have any records” regarding
19 the information. Id. Plaintiff appears to have appealed that decision and, in rejecting Plaintiff’s
20 appeal, the NTSB explains that it “performed an adequate, reasonable search for any records
21 within the scope of [the] request . . . and did not locate any records[.]” Id. Additionally, an e-
22 mail response from the NTSB to an inquiry submitted by Plaintiff confirms that NTSB Accident
23 Reports obtain component or device serial numbers “from both the FAA and airline” and not
24 from “examination of a given component or device[.]” Ex. A (#36).

25 4. As the declaration of David M. Hardy makes clear, the FBI has conducted a
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1 reasonable search in response to Plaintiff's Amended Complaint. The failure of that search to
2 produce responsive documents comports with the fact that the identities of the four aircraft
3 hijacked on September 11, 2001, have never been in question by the FBI. Hardy Decl. ¶ 24.
4 Thus, no documentation exists "revealing the process by which wreckage recovered . . . from the
5 aircraft used during the terrorist attacks of September 11, 2001, was positively identified . . . as
6 belonging to the said aircraft, presumably through the use of unique serial number identifying
7 information contained by the said aircraft's wreckage" Am. Compl. ¶ 1. Plaintiff's Motion
8 for Summary Judgment raises no substantive opposition to the adequacy of the FBI's search and
9 the exhibits Plaintiff submitted provide no countervailing evidence as to the adequacy of the
10 search. Accordingly, Plaintiff's FOIA claim has no merit.

11 CONCLUSION

12 For the foregoing reasons, the Court should deny Plaintiff's Motion for Summary
13 Judgment and grant Defendant's Motion to Dismiss or, in the Alternative, for Summary
14 Judgment.

15 Dated: October 16, 2008

16 Respectfully submitted,

17 GREGORY A. BROWER
United States Attorney

18 PATRICK A. ROSE
19 Assistant United States Attorney

20 JOHN R. TYLER
Senior Trial Counsel

21 /s/ Stephen J. Buckingham
22 STEPHEN J. BUCKINGHAM
23 Trial Attorney
24
25
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PROOF OF SERVICE

I, Stephen J. Buckingham, certify that the following individual was served with the foregoing Combined Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment and the accompanying memorandum of points and authorities in support thereof on this date by the below identified method of service:

Aidan Monaghan
3001 Lake East Drive, #2132-A
Las Vegas, Nevada 89117
via: FEDERAL EXPRESS

Dated: October 16, 2008

/s/ Stephen J. Buckingham
STEPHEN J. BUCKINGHAM